

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in April 2008

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: DISMISSAL; GROSS MISCONDUCT; DUE PROCESS; LARCENY; THEFT OF PROPERTY

CASE STYLE: SIGMAN, J.R v. WEST VIRGINIA STATE UNIVERSITY
DOCKET NO. 2008-0730-WVSU (4/11/2008)

PRIMARY ISSUES: Whether Grievant's summary dismissal for gross misconduct was proper.

SUMMARY: Grievant admitted to taking personal items from students' dorm rooms without authorization. This conduct was also captured on a DVD security monitoring system. Grievant asserted as a defense that this had been allowed by Respondent in years past because the property had been abandoned by students. In the instant grievance, the evidence established the property had not been abandoned and was the subject of larceny. Grievant was dismissed for gross misconduct, and Respondent met its burden of proof. Grievance DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

| | |
|-------------------------------|--|
| <u>KEYWORDS:</u> | ARBITRARY AND CAPRICIOUS; TRANSFER; CUSTOM AND PRACTICE; RETIRED TEACHER |
| <u>CASE STYLE:</u> | <u>MAHONE v. MINGO COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION</u> DOCKET NO. 07-29-126 (4/25/2008) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant, an Assistant Principal, should be reassigned to that position after the position was posted and filled by a qualified applicant. |
| <u>SUMMARY:</u> | <p>Grievant was employed at the beginning of the 2006-2007 school year as a substitute assistant principal at Lenore. The assistant principal position at Lenore was posted on August 11, 2006, and again on September 7, 2006. Grievant held the necessary qualifications to apply for the assistant principal position. Despite the position being posted, Grievant did not apply for the position. Julia Collins, former intervenor, applied for and was awarded the assistant principal position. Respondent asserts hiring a full-time assistant principal instead of having a day-to-day substitute is in the best interest of the students at Lenore. Grievant relies on the past custom and practice of Respondent to retain substitute administrative personnel for the remainder of a school term once they have served for a substantial portion of the term. Grievant also points out in support of his grievance the legislative intent to limit transfers after the fifth day prior to the beginning of the instructional term. The MCBOE has the authority to transfer a professional employee during the instructional term when it is deemed to be in the best interest of the students. MCBOE was obligated to fill the posted position with a qualified applicant that applied for the position during the posting period. In addition, the State Superintendent has the authority to fill the positions of administrators and principals in school systems under State intervention. Grievance DENIED.</p> |

KEYWORDS: DEFAULT; STANDING; EMPLOYEE STATUS; CONTRACT

CASE STYLE: CHANG v. BERKELEY COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-0174-BerED (4/28/2008)

PRIMARY ISSUES: Whether a default occurred at level one and whether Grievant had standing to file this grievance, which was initiated after her employment contract lapsed.

SUMMARY: Grievant was notified in May of 2007 that she was not recommended for rehire for the upcoming school year. She did not request a hearing or the reasons for this decision, nor did she file a grievance at that time. Grievant's one-year, probationary contract expired on July 1, 2007, so her employment status lapsed at that time. Therefore, when she filed this grievance on July 27, 2007, she was no longer an employee and does not have standing to avail herself of the grievance procedure or its default provisions. Default DENIED and grievance DISMISSED.

KEYWORDS: EMERGENCY TAKEOVER; SELECTION; ARBITRARY AND CAPRICIOUS; STATE INTERVENTION

CASE STYLE: HICKS v. MINGO COUNTY BOARD OF EDUCATION

DOCKET NO. 07-29-054 (4/23/2008)

PRIMARY ISSUES: Hiring procedure during emergency declared by State Board of Education; authority of state vs. local officials during emergency "takeover" of local schools; whether state officials' non-selection of Grievant for assistant principal position was arbitrary and capricious.

SUMMARY: Grievant, an assistant high school principal candidate, challenged her non-selection by the State Superintendent of Schools during a period when the State Superintendent was acting under what is known colloquially as the "takeover" authority of the West Virginia Board of Education. Grievant maintained that the county school authorities awarded her the position, but that state officials subsequently withdrew the offer; that the state officials' decision was arbitrary and capricious; and that the state officials failed to comply with selection statutes applicable to county boards of education.

As a matter of law, county school authorities lacked the power to award Grievant the position. At the time in question, their authority had been lawfully preempted by the State Department of Education. The decision of the State Department of Education officials not to place Grievant in the assistant principal position was not arbitrary and capricious. Grievance DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

| | |
|-------------------------------|---|
| <u>KEYWORDS:</u> | COLLATERAL ESTOPPEL; COMPLIANCE WITH LEVEL TWO DECISION; REDUCTION IN PAY; WORK EXPERIENCE CREDIT; NON-RELEGATION; CONTRACT |
| <u>CASE STYLE:</u> | <u>BROOKOVER v. WOOD COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-54-231 (4/29/2008) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant could contest Respondent's implementation of a level two decision, and whether Respondent could eliminate Grievant's private sector experience credit and reduce his rate of pay in his contract to comply with a level two decision. |
| <u>SUMMARY:</u> | <p>Grievant was credited with five years of work experience in the private sector on the salary schedule by the Wood County Board of Education ("WBOE"), and paid at the rate of pay for that level of work experience. Several of Grievant's co-workers filed a grievance alleging this violated the statutory uniformity provisions. That grievance was granted at level two in October 2006, and directed WBOE to remove the five years of experience credit from the Grievant here. Mr. Brookover was not a party to that grievance, and the level two decision was not appealed. WBOE implemented this decision retroactive to the date in October 2006, when the level two decision was issued. This resulted in a reduction in Grievant's salary, and Grievant was "overpaid" for some period of time, and he was required to reimburse WBOE for this overpayment.</p> <p>Grievant argued WBOE was precluded by the statutory "non-relegation" clause from changing the rate of pay in his contract. Grievant also challenged whether the differences between his rate of pay and those of his co-workers violated the statutory uniformity provisions. Grievant did not demonstrate that Respondent's compliance with a prior level two grievance decision was improper or contrary to any law, policy or regulation. Grievance DENIED.</p> |

| | |
|-------------------------------|---|
| <u>KEYWORDS:</u> | COLLATERAL ESTOPPEL; COMPLIANCE WITH LEVEL TWO DECISION; REDUCTION IN PAY; WORK EXPERIENCE CREDIT; NON-RELEGATION; CONTRACT; DISCRIMINATION |
| <u>CASE STYLE:</u> | <u>MILLER v. WOOD COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-54-120 (4/17/2008) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant could contest Respondent's implementation of a level two decision, and whether Respondent could eliminate Grievant's private sector experience credit and reduce his rate of pay in his contract to comply with a level two decision. |
| <u>SUMMARY:</u> | <p>Grievant was hired by the Wood County Board of Education in December 2005, at a rate of pay which gave him credit on the salary schedule for five years of work experience. Several of Grievant's co-workers filed a grievance alleging this violated the statutory uniformity provisions. That grievance was granted at level two in October 2006, and directed WBOE to remove the five years of experience credit from the Grievant here, Mr. Miller, resulting in a reduction in his rate of pay. Mr. Miller was not a party to that grievance, and the level two decision was not appealed. WBOE apparently implemented this decision in December 2006, or January 2007, retroactive to the date in October 2006, when the level two decision was issued, thus, Grievant was "overpaid" for November, December, and a portion of October 2006, and was required to reimburse WBOE for this overpayment.</p> <p>Grievant argued he had negotiated his rate of pay, and would not have accepted employment with WBOE had he not been given credit for five years of experience on the salary schedule, and that it was morally wrong to reduce his rate of pay. He also argued WBOE was precluded by the statutory "non-relegation" clause from changing the rate of pay in his contract. Finally, he argued that another WBOE employee had, in the past, been awarded credit for his private sector experience, which is essentially a discrimination argument. Respondent argued it removed the experience credit from Grievant and reduced his salary to correct an error which had resulted in a violation of the statutory uniformity provision. Grievant did not demonstrate that Respondent's compliance with a prior level two grievance decision was improper or contrary to any law, policy or regulation. Grievance DENIED.</p> |

KEYWORDS: TIMELINESS; REQUEST; TOLL; DISCOVERY; CONTINUING PRACTICE; SENIORITY

CASE STYLE: WEBB v. HAMPSHIRE COUNTY BOARD OF EDUCATION

DOCKET NO. 07-14-334 (4/9/2008)

PRIMARY ISSUES: Whether the grievance was timely filed.

SUMMARY: Grievant argued her seniority date should be changed from October 1, 1996, back to some unidentified date in September 1996, because she was working in the same position for which she ultimately attained seniority, prior to October 1, 1996. Respondent argued the grievance was not timely filed. While Grievant did demonstrate she had discovered in early 2007 that her seniority date on the seniority list was incorrect, she did not initiate the grievance procedure within 15 days of the date of this discovery, as is required by statute, choosing instead to write a letter to HBOE personnel requesting that her seniority date be changed. No one told Grievant not to file a grievance, or led her to believe the matter would be resolved by the board. The grievance was not timely filed. Grievance DISMISSED.

TOPICAL INDEX
STATE EMPLOYEES

| | |
|-------------------------------|---|
| <u>KEYWORDS:</u> | DEFAULT; EXTENSION OF TIME LINES; LEVEL THREE DECISION; EXCUSE; EVIDENCE |
| <u>CASE STYLE:</u> | <u>MCMORRIS v. DIVISION OF CULTURE AND HISTORY</u> DOCKET NO. 07-C&H-316DEF (4/18/2008) |
| <u>PRIMARY ISSUES:</u> | Whether a default occurred at level three, and whether Respondent was excused from the default. |
| <u>SUMMARY:</u> | Grievant argued a default occurred when the level three decision was not issued by the date agreed to by the parties. Respondent agreed that a default had occurred, but argued it had a statutory excuse for the failure to meet the agreed upon extended time lines. Respondent asserted that it was excused from issuing the level three decision by the agreed upon date, because of sickness, injury, excusable neglect, and unavoidable cause. Respondent's representative stated that the level three grievance evaluator had experienced a series of difficulties, including a surgery, his twelve year old daughter had been seriously ill, his house flooded which affected his home office, and he was having some marital problems. Unfortunately, the level three grievance evaluator did not appear at the level four hearing to provide testimony to support Respondent's argument. Default GRANTED. |

KEYWORDS: DISABILITY; ACCOMMODATION; DISCRIMINATION;
SUSPENSION; MITIGATING CIRCUMSTANCES; REDUCTION OF
PENALTY

CASE STYLE: COSGROVE v. STATE TAX DEPARTMENT

DOCKET NO. 07-TD-082 (4/9/2008)

PRIMARY ISSUES: Whether a particular disability accommodation is discriminatory under the grievance statutes; whether suspension should be reduced when it was imposed without due consideration of Grievant's disability; with conflicting evidence on whether Grievant's performance was poor; and with Respondent failing to prove a written tardiness policy on which it relied in imposing discipline.

SUMMARY: To accommodate Grievant's rheumatoid arthritis, Respondent altered her work schedule in a manner Grievant claimed was unnecessarily rigid, and made it impossible for her to take lunch with her co-workers. Grievant grieves the work schedule as discriminatory. Respondent also suspended Grievant for five days for excessive tardiness, poor work performance, and improper use of email. Grievant challenges the suspension as unjustified and overly harsh.

The employer's methods of accommodation were not discriminatory. On the suspension, the Respondent failed adequately to consider the possible impact of Grievant's disability on her work performance. The documentary record of Grievant's performance did not adequately support the length of the suspension imposed. Respondent failed to prove the written tardiness policy on which it relied in imposing discipline. Grievance granted in part and denied in part. Suspension reduced to three days, Grievant to be made whole and Grievant's disciplinary record to be modified consistent with Decision.

KEYWORDS: EQUAL PAY FOR EQUAL WORK; COMPENSATION; PAY GRADE

CASE STYLE: CRIGGER v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS

DOCKET NO. 07-DOH-394 (4/24/2008)

PRIMARY ISSUES: Whether Grievant should be paid a higher salary.

SUMMARY: Grievant, who is paid within her pay grade, asserts she should receive more compensation due primarily to a fellow agent being recently reallocated to Transportation Realty Agent 3, and receiving a higher salary. Grievant also asserts she should receive more compensation because she is one of the lowest paid agents within the class on a statewide basis. Grievant did not meet her burden of proof. She is compensated within her pay grade, and Respondent did not violate the equal pay for equal work principles. Grievance DENIED.

KEYWORDS: SENIORITY; SHIFT ASSIGNMENTS; ARBITRARY AND CAPRICIOUS

CASE STYLE: MILLER v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL

DOCKET NO. 07-HHR-077 (4/30/2008)

PRIMARY ISSUES: Whether another employee should receive seniority and shift preference over Grievant?

SUMMARY: Grievant contends that another laboratory employee should not receive preference over her with regard to shift assignments. Welch Community Hospital has policies in place which define seniority and state that laboratory employees are assigned to shifts, with seniority being recognized for preferential assignments. The other lab employee has far more seniority than Grievant, and he is also in a classification which requires supervision by other employees. Therefore, Respondent established reasonable justification for assigning him only to day shift. Grievant failed to prove this decision was arbitrary and capricious or in violation of any law or policy. Grievance DENIED.

| | |
|-------------------------------|--|
| <u>KEYWORDS:</u> | TERMINATION; MISCONDUCT; BRIBE; CONTRABAND |
| <u>CASE STYLE:</u> | <u>WEST v. DIVISION OF JUVENILE SERVICES</u> DOCKET NO. 05-DJS-034 (4/1/2008) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent met its burden of proof and established the charges that Grievant brought contraband into the facility and accepted a bribe from a resident of the facility. |
| <u>SUMMARY:</u> | Grievant was terminated for bringing contraband into the facility and accepting a bribe from a resident of the facility. Grievant admitted he had brought contraband into the facility and should not receive back pay. Grievant then amended his relief sought to request that the termination letter only state he was guilty of this charge. Respondent would not agreed to this change in the termination letter. Respondent met its burden of proof and established Grievant was guilty of the charges. Grievance DENIED. |
| <u>KEYWORDS:</u> | TIMELINESS |
| <u>CASE STYLE:</u> | <u>WHYTE v. DEPARTMENT OF ENVIRONMENTAL PROTECTION AND DIVISION OF PERSONNEL</u> DOCKET NO. 07-DEP-364 (4/3/2008) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant's claim was timely filed; whether Grievant was properly classified. |
| <u>SUMMARY:</u> | Division of Personnel has proven by a preponderance of the evidence that the grievance should be denied on the basis that it was not timely filed. Grievant did not demonstrate a proper basis to excuse his failure to file in a timely manner. Although misclassification is a continuing practice, Grievant did not file his grievance while the practice continued, and was outside the time limit for doing so after it ended. |